



**Business Models for Competitive Success in the United States Textile Industry:  
A Tale of International High Fashion Gone Awry**

Janine Hiller  
Professor of Business Law  
Virginia Tech  
Blacksburg, Virginia 24061  
[jhiller@vt.edu](mailto:jhiller@vt.edu)

Ronnie Cohen, J.D., LL.M.  
Professor of Business Law  
Christopher Newport University  
Newport News, VA 23606  
[rcohen@cnu.edu](mailto:rcohen@cnu.edu)

**ABSTRACT**

*French law protects fashion designs by copyright, whereas the United States copyright law offers no similar protection. The policies of these laws are brought into direct conflict when Viewfinder, a Delaware corporation, posts images from a French fashion show on an internet site hosted in the United States. French designers initially sue in France to enforce their rights, demanding that the photos be removed and that fines be imposed. This case chronicles the conflict between French designers and a United States website, highlights competing values, policies, and laws, and asks critical questions about how technology affects the fashion industry and its international environment.*

*Keywords: Copyright, fashion industry, French design, business models*

---

Introduction

This case involves international fashion designers, photographers, and websites. The internet brings these entities together, and unfortunately stirs controversy amongst the disparate groups over the photographs of fashion designs posted on internet sites. The resolution of this copying dispute involves courts from Paris and New York, and ultimately requires consideration of the nature of fashion, technology law and public policy. A brief background of the fashion industry and the parties involved provides information relevant to the conflicting

values that must be balanced, followed by a description of the facts and the dispute.

History of the French Fashion Industry

In the 17<sup>th</sup> century, French dressmakers, using luxurious, expensive fabrics, designed clothing for their aristocratic clients. France became the center of production for these textiles and thus the center of fashion for the aristocracy. Later, in the 19<sup>th</sup> century, dressmakers were transformed from artisans working for their individual clients, to artists, whose reputation came, not from the clients for whom they worked, but from

their own names which they imprinted on their creations. Thus, the beginning of what has come to be known as the designer label. Designers established couture or fashion houses where the garments were individually crafted, but the client now came to the designer; a complete reversal of the previous arrangement.

Charles Frederick Worth became a women's clothing designer in the 19<sup>th</sup> century. This vocation was previously open only to women designers because of the nature of contact between the dressmaker, and later the designer, and the client. Worth is known as the "father of *haute couture*." He formed a group called "*La Chambre Syndicale de la confection et de law couture pour dames et fillettes*." This group dealt with issues related to the fashion industry on behalf of the designers.<sup>1</sup>

In the early 20<sup>th</sup> century, the group was renamed "*La Chambre Syndicale de la haute couture parisienne*." *La Chambre* admitted members based on the creativity of their designs and the quality of the work, and limited membership to designers whose work was individually made for particular clients. Requirements included:

- employing at least 20 persons in the production of clothes in the company's studios;
- presenting for each season, spring and fall, a collection of at least 75 designs;
- presenting these collections with the help of at least three live models;
- doing so in the house itself, in special areas designed for this purpose.<sup>2</sup>

These strict requirements successfully prevented foreign competitors from using the "*haute couture*" label, which was, until

<sup>1</sup> The previous paragraphs are summarized from Valerie Steele, *ENCYCLOPEDIA OF CLOTHING & FASHION*, 2005 p. 186-188.

<sup>2</sup> Diana Crane, *Globalization, organizational size, and innovation in the French luxury fashion industry: Production of culture theory revisited*, 1997 *POETICS: J. EMPIRICAL RES. LITERATURE, THE MEDIA AND THE ARTS*, 393-414.

the 1960s, the symbol of legitimacy in the luxury fashion world.<sup>3</sup>

A major concern of this group was the protection of designs. The *Association de protection des industries artistiques saisonieres (PAIS)* was created to address the issues of design piracy and reproductions of designer clothing. The function of intellectual property protection was transferred to *La Chambre*, and became even more important as the designers entered the ready to wear market, or *prêt à porter*, and subsequently extended their labels to a myriad of products from home décor to bath products to eyeglass frames.

Beginning in the late 1960s, the luxury fashion industry began to face pressures from a growing global economy. "An evolution of the customer base and of its lifestyle has combined with technological transformations and a globalization of markets. These global trends have been further reinforced by an increasing competition and by the emergence, in particular, of companies challenging the predominance of traditional French haute couture houses."<sup>4</sup> The original elite client group for designer made to order clothing declined and was replaced by a growing mass of middle and upper-middle class customers, looking for "signs of distinction" but not necessarily the same sense of luxury. Thus, reliance on the intrinsic quality of designer luxury clothing no longer could sustain the industry.<sup>5</sup>

In addition to the changing nature of the markets, there was also geographic expansion into the Middle East, Asia, and Eastern Europe. As a result, today's fashion demand is less homogenous, and companies have had to find ways to integrate tradition

<sup>3</sup> Marie-Laure Djelic and Antti Aniamo, *The CoEvolution of New Organizational Forms in the Fashion Industry: A Historical and Comparative Study of France, Italy and the United States*, 10 *ORGANIZATION SCIENCE* 622, 626.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 627

and innovation, technological tools of mass production and high standards of craftsmanship.<sup>6</sup> These new challenges have opened the door for United States and Italian companies to enter the market and bypass the stringent requirements of *La Chambre*.

Competition in this new environment led the haute couture houses of Paris to expand to other lines, and begin licensing or outsourcing perfumes, accessories and ready to wear lines. While the designer Hermès resisted this trend and built its modern reputation as a true luxury company on its refusal to outsource, other designers have embraced these new marketing opportunities. Pierre Cardin, for example has been quite prosperous in its licensing, but it was subsequently excluded from the *Chambre Syndicale*.<sup>7</sup> Although France is still generally associated with the fashion segment of the luxury goods market, its leading designers now represent a much smaller turnover than the leading Italian or American designers.<sup>8</sup>

#### *Brief History of Louis Feraud House*<sup>9</sup>

In 1950, Louis Féraud created his first “Maison de Couture” in Cannes, France, and in 1955 he established his Paris Couture House. In 1957, Feraud became the wardrobe designer for one of his most famous clients: Brigitte Bardot. And in 1958 Feraud made the first presentation of his House’s collection in Paris.

In the 1960s, Feraud brought other designers into his couture house. In 1970, he initiated a ladies ready to wear line (*prêt à porter*). Over the course of the next several decades, Feraud won numerous awards, including the prestigious *Prince de l’Art de Vivre*, and culminating on March 16, 1995 when he was decorated by the President of France as

an *Officier de la Légion d’honneur*. Feraud died in 1999, and in that same year a Dutch group *Secon* acquired the Feraud house.

Beginning in the year 2000, the Feraud house moved predominantly to the ladies ready to wear (*prêt à porter*) market and licensing of its designer name. It has since been acquired by a private equity fund.

#### The United States Fashion Industry and Viewfinder

Currently, the global fashion industry sells more than \$750 billion of apparel annually.<sup>10</sup> Designers are located primarily in the U.S., Europe, and to a lesser degree, Japan. The major fashion houses create new designs which are introduced through collections at seasonal fashion shows. American designer companies, however, have concentrated to a greater extent than their European competitors, on other luxury goods, such as perfumes, leather goods, and accessories, and by doing so, have avoided strict requirements such as those imposed by *La Chambre* on the French designers.<sup>11</sup> In fact, none of the U.S. designers began as *haute couture*, rather they built their name recognition by “scaling up” their products and having the public associate them with the haute couture of France.<sup>12</sup>

As one commentator explained, “[w]hen design and creation are still at the heart of the French luxury fashion industry ...one could easily argue that, for American players, the source of competitive advantage has been brand management.”<sup>13</sup>

Viewfinder is a Delaware publishing corporation operating a website under the name of firstVIEW, found at <http://www.firstview.com> (hereafter, Viewfinder). The website describes itself as

<sup>10</sup> Kal Raustiala and Christopher Sprigman: *IP and Fashion Design Working Draft*: January 2006, at 8. available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=878401](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=878401).

<sup>11</sup> *Id.*

<sup>12</sup> Djelic, supra note 3 at 632.

<sup>13</sup>

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 629.

<sup>8</sup> *Id.*

<sup>9</sup> Summarized from:

<http://www.modeaparis.com/va/couturiers/lfe/index.html> (visited May 19, 2006).

an “international fashion magazine,” and lists itself as the “photo partner” of several fashion shows, none of which are in France, however. Viewfinder takes runway photographs of both the haute couture and ready to wear fashion shows, from venues around the world. The photographs are posted online within hours of the fashion show, and are available for viewing for a fee, starting at \$9.95 per hour. Licenses to use photographs range from \$100-\$350 per photograph, and the website list of clients includes well known and diverse publishers, such as Cosmopolitan and the Wall Street Journal.

### The Dispute

In January, 2001, several French design houses, including Sarl Louis Feraud, Céline, Givenchy, Kenzo, Christian Lacroix, International Loewe and Louis Vuitton Malletier (representing the brand names "Céline", "Givenchy", "Kenzo", "Christian Lacroix", "Loewe" and "Louis Vuitton"), brought multiple lawsuits in the Tribunal de Grande Instance de Paris, seeking damages for unauthorized use of their intellectual property and unfair competition.<sup>14</sup> They alleged that Viewfinder made unauthorized use of their intellectual property and engaged in unfair competition by posting photographs of fashion show runway models wearing clothing of their design. Specifically, the designers maintained that the photographs violated French copyright law, which protects articles of fashion from copying without the permission of the author (see Appendix I). In France, garment designs were first protected as applied art under the Copyright Act of 1793 and later additional protection

---

<sup>14</sup> There were several cases brought in the Paris Tribunal, and these were consolidated upon the filing of these cases in the United States. The exact connection from the District Court to the Paris Tribunal is unclear to the authors, however one French decree may be found at; “Tribunal de Grande Instance de Paris 1ère chambre, 1ère section Jugement du 2 mai 2001,” at [http://www.legalis.net/jurisprudence-decision.php3?id\\_article=340](http://www.legalis.net/jurisprudence-decision.php3?id_article=340).

was granted for nonfunctional designs and patterns under the Act of 1909. In addition, a 1952 change in the French law allowed protection of garment designs without any showing of originality; instead, goods are protected once they have become popular with the public.<sup>15</sup> In the United States, fashion garments are not protected by copyright, although they may receive limited protection under other intellectual property laws. (see Appendix II).

Viewfinder was given notice of the legal proceeding in Paris according to international agreements, but it chose not to respond to this initial law suit. Accordingly, in May 2001, the Paris tribunal granted a default judgment in favor of the designers, ordered Viewfinder to remove the offending photographs subject to a fine at 50,000 francs per day penalty for noncompliance, and awarded damages of 1,000,000 francs (\$183,007.42) plus the costs of the case.

In 2004, Feraud sought to collect the French damages imposed by the French court against Viewfinder by first obtaining an order freezing Viewfinder’s accounts at Citibank, and then filing a lawsuit in the United States District Court for the Southern District of New York to enforce the French judgment.

In the international context, the United States will follow the principle of comity, which allows a U.S. court a certain discretion in whether it will or will not enforce the decree of another country. As explained by the district court;

*Comity is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts*

---

<sup>15</sup> 1 COPYRIGHT LAWS AND TREATIES OF THE WORLD (France) item 18, at 1-2 UNESCO 1977.

*of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws. "Comity will be granted to the decision or judgment of a foreign court if it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated." (citations omitted)<sup>16</sup>*

Viewfinder moved to dismiss the case on three grounds: first, “the damages awarded are excessive and bear no reasonable relation to plaintiffs’ actual damages; second, because the underlying French law is inconsistent with American copyright and intellectual property principles; and third, because enforcement of the judgment would be inconsistent with the First Amendment.”

In November of 2005, the district court issued a decision in favor of Viewfinder. The court addressed each of Viewfinder’s arguments. First, the court stated that Viewfinder was in no position to contest the amount of the damage award because it chose not to defend itself in the French court where there was an opportunity to present evidence on this matter.

Second, in considering whether the conflicting French copyright laws that protected clothing designs violated United States public policy, the court found that;

*Copyright and trademark law are not matters of strong moral principle. Intellectual property regimes are economic legislation based on policy decisions that assign rights based on assessments of what legal rules will produce the greatest economic good for society*

*as a whole. Different countries will, at different times, reach different conclusions as to the types of creative endeavor that should receive the benefit of copyright protection and the extent of that benefit, and different conclusions as to the kinds of competitive activity that should be encouraged or discouraged by trademark law. If the United States has not seen fit to permit fashion designs to be copyrighted, that does not mean that a foreign judgment based on a contrary policy decision is somehow “repugnant to the public policies underlying the Copyright Act and trademark law.” (Def.Mem.2.) “Under New York law [,] … foreign decrees and proceedings will be given respect … even if the result under the foreign proceeding would be different than under American law.”*

The court found Viewfinder’s third argument, that the photographs are speech protected under the First Amendment, persuasive and stated that:

*The freedoms of speech and of the press protected by the First Amendment are not mere vagaries of legal policy, matters of legal detail that might as easily have been resolved differently by our legislatures or courts. Freedom of speech is a matter of constitutional command, binding even on the will of the majority as expressed in legislation. The very Congress of the United States “shall make no law abridging the freedom of speech, or of the press.” Even among the basic human rights protected by the United States Constitution, the First Amendment occupies a special place. As Justice Cardozo put it, the American legal tradition “reflects a pervasive recognition of th[e] truth” that freedom of speech is “the*

J  
T  
A  
T  
M

<sup>16</sup> Sarl Louis Feraud Intern. v. Viewfinder Inc., 406 F.Supp.2d 274, 279 (S.D.N.Y. 2005).

*matrix, the indispensable condition of nearly every other freedom.”*

The court noted that “[f]ashion shows are a matter of great public interest, for artistic as well as commercial purposes.” While recognizing that democratic countries around the world could reasonably differ about the proper limits to free speech, the court found that freedom of expression is a fundamental public policy of the United States; the French copyright law could not be enforced because it violated this essential national principle.

The case against Viewfinder was dismissed.

The controversy has not yet ended however, as Feraud has appealed the case to the Second Circuit Court of Appeals. These issues will be reviewed at least one more time in a United States court.

#### Discussion Questions :

Why do you think Viewfinder decided not to appear in or answer the case filed in Paris? Was this the best decision?

Fashion copies, or “knockoffs” are prevalent in the industry, and there are few cases brought against the copiers. Why would the designers decide to pursue this case against Viewfinder, both in French and United States courts?

The movie and music industries have aggressively protected their copyrights under increasingly strict United States copyright law. Compare how the two industries have strategically chosen to use intellectual property law in their business models.

Do you agree with the District Court’s decision that copyright is a matter of economics and not a matter of fundamental public policy?

Discuss how fundamental values are in conflict in this case, and what part technology has in the conflict and debate.

## Appendix I: French Law of Copyright

### **Article L112-1**

The provisions of this Code shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose.

### **Article L112-2**

**(Act No. 94-361 of 10 May 1994 art. 2  
Official Journal of 11 May 1994)**

The following, in particular, shall be considered works of the mind within the meaning of this Code:

- 1°.books, pamphlets and other literary, artistic and scientific writings;
- 2°.lectures, addresses, sermons, pleadings and other works of such nature;
- 3°.dramatic or dramatic-musical works;
- 4°.choreographic works, circus acts and feats and dumb-show works, the acting form of which is set down in writing or in other manner;
- 5°.musical compositions with or without words;
- 6°.cinematographic works and other works consisting of sequences of moving images, with or without sound, together referred to as audiovisual works;
- 7°.works of drawing, painting, architecture, sculpture, engraving and lithography;
- 8°.graphical and typographical works;
- 9°.photographic works and works produced by techniques analogous to photography;
- 10°.works of applied art;
- 11°.illustrations, geographical maps;
- 12°.plans, sketches and three-dimensional works relative to geography, topography, architecture and science;
- 13°.software, including the preparatory design material;

J  
T  
A  
T  
M

14°.creations of the seasonal industries of dress and articles of fashion. Industries which, by reason of the demands of fashion, frequently renew the form of their products, particularly the making of dresses, furs, underwear, embroidery, fashion, shoes, gloves, leather goods, the manufacture of fabrics of striking novelty or of special use in high fashion dressmaking, the products of manufacturers of articles of fashion and of footwear and the manufacture of fabrics for upholstery shall be deemed to be seasonal industries.

**Legifrance Act n° 2003-706 of 1 August 2003, Art. 84, Official Journal of 2 August 2003. (emphasis added)**

Appendix II: United States Law of Copyright

**U.S. Code Title 17, § 102. Subject matter of copyright: In general**

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery,

regardless of the form in which it is described, explained, illustrated, or embodied in such work.

*“Designs for useful articles, such as vehicular bodies, wearing apparel, household appliances, and the like are not protected by copyright. However, the design of a useful article is subject to copyright protection to the degree that its pictorial, graphic, or sculptural features can be identified as existing independently of the utilitarian object in which they are embodied.”*

The line between uncopyrightable works of industrial design and copyrightable works of applied art is not always clear. A two-dimensional painting, drawing, or other graphic work is still identifiable when it is printed on or applied to useful articles such as textile fabrics, wallpaper, containers, and the like.”

<http://www.copyright.gov/fls/fl103.html>  
(emphasis added)

TEACHING NOTE

General Notes:

J  
T  
A  
T  
M  
Excerpts of the United States and French copyright law are found in the appendices. Additional information about intellectual property law and fashion design provides a more complete picture. Trademarks protect the designer against pure copying, by those who would counterfeit items to sell as originals. Trademarks are identifiers of products, and do not protect the design itself. If a Nike swoosh, for example, is associated with a product not produced by Nike, it would violate Nike’s trademark, and would confuse consumers as to the origin of the work.

In limited cases the design of a fashion may be patented. A utility patent may be granted if the fashion is useful and novel, such as a unique design for an ergonomically sound pocket book.. On the other hand, a design patent may only be granted if the fashion is

NOT useful or obvious; it must be ornamental, nonfunctional and new. Most fashion designs will not meet these requirements, because clothes are essentially functional, and different designs, taken in their entirety, are not usually nonobvious or new. In addition, the patent application process is lengthy and costly and not well suited to the fast moving fashion design industry.

Copyrights also are not granted in the United States for fashion designs, similarly because of the useful nature of clothing. The “useful article doctrine” of the U.S. copyright law requires that the functional element of a design be able to be separated from its purely creative element so that the creative element may be protected, not the functional element. For example, the design imposed on a belt buckle, separate from the buckle itself, was held to be copyrightable.<sup>17</sup>

French law is one implementation of the European Union Community Design Directive. Under this directive, a design is defined as “the appearance of the whole or part of a product resulting from the features of, in particular, the lines, contours, colors, shape, texture and/or materials of the product itself and/or its ornamentation.” The design must be new and have individual character as compared to previous designs. This EU legislation includes two types of protection for fashion designs (among other industrial designs); the UCD or Unregistered Community Design and the RCD or Registered Community Design. Importantly, the UCD arises automatically when the article is made publicly available, and endures for three years. This will be the usual route for fashion designs since there is no cost, and because it is unlikely fashion designs need protection longer than three

---

<sup>17</sup> A good discussion of how each different form of intellectual property protection may, or may not, apply in the fashion industry is found in Tsai, Julie P., “Fashioning Protection: A Note on the Protection of Fashion Designs in the United States, 9 LEWIS & CLARK L. REV. 447, 453-461 (2005).

years due to seasonal new fashion designs and trends.<sup>18</sup>

#### Discussion Questions:

1. Why do you think Viewfinder decided not to appear in or answer the case filed in Paris? Was this the best decision?

Of course there is no one answer to this question, but it should provoke an interesting discussion relating to doing business globally, and the strategies that a business may employ. Viewfinder was served with notice as required under international law, so there is no doubt that they knew about the case. Was their failure to respond related to their lack of preparation for doing business globally, not knowing French law, or the failure to have local legal counsel? In the case the court notes that Viewfinder attempted to appeal the case in France, but evidently missed the filing date and failed to follow proper procedures so that the appeal was withdrawn. However, if the failure to answer was an intentional strategy then Viewfinder may have had advice that whatever the result of the case that it would not be enforceable in the United States. The precedent for this is the case of Yves Saint Laurent v. Ralph Lauren<sup>19</sup>, in which Yves Saint Laurent won a case in France against Ralph Lauren for the copy of a tuxedo dress, but was unable to enforce the decree in the United States.

The instructor may want to compare this case to the Yahoo! v. LICRA<sup>20</sup> case that has been in the news and courts for many years. In that case Yahoo! appeared in a French court to defend itself against a charge that it illegally allowed Nazi items to be promoted and sold on its auction website. Yahoo!

---

<sup>18</sup> Aide, Christopher, “The Community Design: European Union-wide Protection for Your Design Portfolio,” 1 Nw. J. TECH. & INTELL. PROP. 2 (2003).

<sup>19</sup> Tsai, *supra* note 17 at 464-65.

<sup>20</sup> [Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme](#), 433 F.3d 1199, (9<sup>th</sup> Cir. 2006).

argued that it should not have to remove the items because the website was a U.S. domain and that the enforcement of the French law would infringe speech protected by the First Amendment. Yahoo! lost the case in France, and subsequently filed a case in the United States in order to prevent enforcement of the French decree. Yahoo! was trying to establish a legal precedent about what laws will be enforced across national boundaries when electronic commerce is involved. Perhaps Viewfinder thought that the principle was already established in the case of copyright law as applied to fashion designs. If they had no assets in France, and no intent to do so in the future, then they may have thought that they were “judgment proof” anyway, and decided not to incur the costs of the lawsuit in France.

Lastly is the question of whether Viewfinder failed to show respect for the French courts by not appearing in the case. If the student visits the firstVIEW website, they will find that many of the French designers’ runway shows are not posted, under a policy not to include these photographs without the permission of the designers. Clearly, the French case has had an effect on the posting of the photographs.

2. Fashion copies, or “knockoffs” are prevalent in the industry, and there are few cases brought against the copiers. Why would the designers decide to pursue this case against Viewfinder, both in French and United States courts?

The second question asks the student to look at the decision making from the opposite side. French fashion designers are certainly familiar with the United States law that does not protect apparel with copyright. However, the changes in technology have imposed more pressure on the industry. Posting photographs on the Internet allows for viewing of fashions around the world instantaneously. No longer does distance provide a modicum of protection for

designers who have their works copied quickly and distributed for a fraction of the cost to the general public. In the fashion industry, “Speed of production is of the greatest importance. Mass dissemination is becoming the prevalent mode of fashion adoption. Oscar de la Renta commented that information is traveling a bit too fast—a denim coat from his collection had been copied and was selling at Bloomingdale’s before his original version reached the stores.” The life span of a fashion trend is only from 3-5 months, when it previously could have extended for up to a year. This shortening of the time span for profit making based on creative designs is due, primarily, to the advent of new communication technologies.<sup>21</sup>

The French fashion industry is ranked in the top three exporting industries, and is the second largest employer in France<sup>22</sup>. Since the copying of fashion designs costs the industry billions of dollars a year, there is certainly an economic incentive to pursue the case in France, and then attempt to set a precedent in the United States by enforcing the judgment.

3. The movie and music industries have aggressively protected their copyrights and have obtained increased protection under U.S. law. Compare how the two industries have used intellectual Property law strategically, in their business models.

Students may find the comparison between the music industry and fashion industry quite interesting and might be asked to draw comparisons. The music industry has obtained increased protection and has spiritedly enforced its easily copied works, and while the fashion industry is similarly plagued by copying, it has no copyright protection to enforce. Students can be

<sup>21</sup> Gina Stephens Frings, FASHION: FROM CONCEPT TO CONSUMER 56, 74 (2002).

<sup>22</sup> *Id.* at 149.

directed to review the Digital Millennium Copyright Act,<sup>23</sup> and some of the music and film copyright cases that are listed in the additional references for this Note. Yet, the fashion industry continues despite copying, and some argue that the industry even benefits from copying (see above). Students may also be asked to present a cross country case study of the industries, relevant law, the impact of technology on each, and the industry response. As mentioned in the Background case material, French fashion designers are global leaders, and have been for centuries. Membership in the haute couture is limited, and there are therefore strong cultural and economic reasons for the French to protect the creativity of its fashion designers. (see also the case background discussion).

4. Do you agree with the District Court's decision that copyright is a matter of economics and not a matter of fundamental public policy?

The source of authority for copyright law is found in the United States Constitution, Article I, which states that Congress may "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." It may be argued that this represents the highest source of public policy: the U.S. Constitution. However, it can also be argued that Article I expresses the very practical approach to a property regime, that exclusive rights are granted for a limited time period in order to spur innovation.

Students may also consider the Berne Convention, an international intellectual property agreement ratified in part by the United States. The agreement is not specific about the protection of fashion designs, and the United States participation in this global property schema requires it to meet minimum standards of protection and to

grant foreign authors the same rights as United States authors. Although not specifically required under this international agreement it may be argued that the spirit of the document would weigh in favor of the United States respecting the copyrights granted to fashion designs in so much of the rest of the international community.<sup>24</sup>

As in any discussion of intellectual property, students should be encouraged to discuss the value of intellectual property as a business asset, and in this case to try and envision what the broad impact of the decision would be for businesses if intellectual property law is considered to be economic, and not based on public policy.

5. Discuss how fundamental values are in conflict in this case, and what part technology has in the conflict and debate.

The value of freedom of speech in the United States can be contrasted with the French protection of creative works that are considered to arise because the author has moral rights in the creation. The instructor may wish to have the students delve more deeply into the reasons for the differences in copyright law by considering the concept of moral rights, the basis for European copyright laws, which would shed a different light on the arguments of whether copyright is a concept of fundamental policy. (this question also connects to the issue of copyright as a purely economic choice, question 3).

There is some movement to add a sui generis right for the protection of fashion designs to United States copyright law. On March 30, 2006, Rep. Goodlatte introduced legislation, the Design Piracy Prohibition Act, H.R. 5055, which would protect fashion designs for three years and impose penalties of up to \$250,000 for infringement. The stated reason for the legislation is economic, to protect the fashion industry from

<sup>23</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

<sup>24</sup> Nurbhai, Safia A., "Style Piracy Revisited," 2002 J. Law & Prop. 489, 514-15 (2002).

counterfeits that cost an estimated \$200-250 billion dollars in sales, and to promote the growing US fashion industry and accompanying jobs.<sup>25</sup>

On the other side, students may consult the Norman Lear Center for Creativity, Commerce and Culture, which posts the research and presentations from a project called “Ready to Share: Fashion and the Ownership of Creativity.” (<http://www.learcenter.org/html/projects/?cm=ccc/fashion>) In an introduction to the project, the center notes,

*Two of the most prodigious and prolific sectors of global culture – music and film – are ensnarled in very public, long-term conflicts over the control of creativity. Much of the controversy revolves around the scope of legal protection that creative works should enjoy and whether prior works may be freely re-used. It is striking that the fashion industry, which is a \$298 billion dollar market in the United States alone, is driven by similar market forces and yet manages its creative output so very differently. Rather than rejecting derivation and appropriation outright, the fashion industry has found a way to incorporate these practices into the core of the industry while continuing to be competitive and innovative.*

This website provides video of the discussion as well which could be a useful tool for the instructor.

The public policy of freedom of speech held so dearly in the United States is not applied as broadly in much of the rest of the world, including France. As the District Court describes, many countries judge that other important interests, such as human rights, may limit free speech, while the United States has protected the right to speech more

fiercely because it underlies the protection of all other rights. The ACLU, EFF, and the Center for Democracy and Technology filed a joint amicus brief which eloquently describes the international tensions and argues for the concomitant need to guard rights to electronic speech.<sup>26</sup>

Technology, particularly the meteoric rise of the Internet, has brought the world much closer. The global conflicts that arise, based on fundamental differences in policy, are increased because of this new technology. Businesses will need to be more aware of the potential conflicts and more sensitive to cultural and legal challenges.

#### Additional References

Hetherinton, Samantha, “Fashion Runways Are No Longer the Public Domain: Applying the Common Law Right of Publicity to Haute Couture Fashion Design,” 24 Hastings Comm. & Ent. L.J. 43 (2001).

Mencken, Jennifer, “A Design for the Copyright of Fashion,” 1997 B.C. Intell. Prop. & Tech. F. 121201 (1997).

Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 125 S.Ct. 2764 (2005).

A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9<sup>th</sup> Cir. 2001).

Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001)

J  
T  
A  
T  
M

---

<sup>25</sup> <http://www.house.gov/goodlatte/dppress109.htm>

---

<sup>26</sup> The amicus brief may be found at <http://www.eff.org/global/jurisdiction/viewfinder-amicus-final.pdf>.

J  
T  
A  
T  
M